
The Sherman Antitrust Act reflects a federal policy favoring free market competition as the essential regulating force of the economy. Because the states have been increasingly substituting direct regulation of the economy for the forces of competition, however, the courts have been faced with the task of accommodating the Sherman Act to the states’ legitimate interests in regulating matters of local concern. The result of this judicial process of accommodating conflicting federal and state interests has been the development of the state action exemption to the antitrust laws. Broadly defined, the exemption frees otherwise unlawful activity from antitrust liability when undertaken

2. It should be noted that Congress has granted antitrust exemptions to certain private activities approved by federal agencies. These exemptions are set forth in Pogue, The Rationale of Exemptions from Antitrust, 19 A.B.A. ANTITRUST SECTION 313, 330-54 (1961).
4. Professor Milton Handler has summarized the constitutional requirements for permissible state regulation:

   [The area regulated [must] be a proper subject of local concern, ... the regulation [must] not discriminate against interstate commerce or otherwise run afoul of the commerce clause, and ... there [must] be no federal regulatory legislation that either is inconsistent with the state program or manifests a Congressional intent to preempt the field. (footnotes omitted). Handler, Twenty-Fourth Annual Antitrust Review, 72 COLUM. L. REV. 1, 6-7 (1972). See, e.g., Huron Portland Cement Co. v. Detroit, 362 U.S. 440 (1960); Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520 (1959); Dean Milk Co. v. Madison, 340 U.S. 349 (1951); Southern Pac. Co. v. Arizona, 325 U.S. 761 (1945).

5. The state action exemption is premised on the view that Congress did not intend the Sherman Act to apply to restraints of trade imposed by the state acting as sovereign. See Parker v. Brown, 317 U.S. 341, 352 (1943), discussed at notes 37-48 infra & accompanying text. The doctrine represents judicial concern for the principles of federalism by enabling state officials to implement social and economic policies free from the strictures of the federal antitrust laws.
pursuant to the legislative command of the state. As the doctrine has developed, however, state-sanctioned anticompetitive activity usually has been exempt from federal antitrust laws only where the state has determined that competition is not desirable in a particular sector of the economy and has substituted its own regulatory program for the forces of competition. In applying the exemption, the courts have neither analyzed the adequacy of the state policy sought to be achieved through the regulatory scheme nor weighed the sufficiency of this policy against the Sherman Act's aim of encouraging competition. Coupled with the states' increased substitution of regulatory for competitive principles, this broad interpretation of the scope of the state action exemption has had the effect of placing increasing areas of economic activity beyond the reach of the antitrust laws.

The Supreme Court's recent decision in Cantor v. Detroit Edison Co., however, considerably narrows the scope of the state action exemption by indicating that the mere existence of state regulation alone is insufficient to immunize state-approved anticompetitive activity from the application of the antitrust laws. Cantor arose from an antitrust action filed by a retail drugstore owner against the Detroit Edison Company, in which it was alleged that the electrical utility had used its state-sanctioned monopoly in the distribution of electricity to restrain competition in the sale of light bulbs. Detroit Edison had been furnishing customers in its marketing area with approximately five million people in southeastern Michigan. 

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7. See, e.g., Duke & Co., Inc. v. Foerster, 521 F.2d 1277 (3d Cir. 1975) (exemption inapplicable to private and public parties' conspiracy to boycott plaintiff's beverage sales in municipal facilities); George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 424 F.2d 25 (1st Cir. 1970), cert. denied, 400 U.S. 850 (1972) (no exemption for subversion of competitive bidding for public swimming pool contract); Asheville Bd. of Trade, Inc. v. FTC, 263 F.2d 502 (4th Cir. 1959) (anticompetitive activities of state-created but privately operated board of trade subject to antitrust laws); United States v. Nat'l Soc'y of Professional Eng'rs, 389 F. Supp. 1193 (D.D.C. 1974) (no exemption created by state statutes prohibiting competitive bidding as statutes failed to establish alternate form of public regulatory control).
8. See Slater, supra note 3, at 91.
12. Detroit Edison distributed electricity and light bulbs to approximately five million people in southeastern Michigan. Id. at 582.
mately half of their standard sized light bulbs under a program that imposed no separate charge for the bulbs in its customers' monthly electricity bills.\textsuperscript{13} The utility's rates, which took into account the practice of furnishing light bulbs without charge, had been approved by the Michigan Public Service Commission and could not be altered without the Commission's approval.\textsuperscript{14} Although the Commission was vested by the legislature with broad powers to regulate all aspects of the utility's operation,\textsuperscript{15} it had made no specific investigation of the competitive impact of Detroit Edison's light bulb program.\textsuperscript{16}

The District Court for the Eastern District of Michigan granted Detroit Edison's motion for summary judgment on the basis of the state action exemption\textsuperscript{17} and the court of appeals affirmed the ruling in an unpublished opinion.\textsuperscript{18} The Supreme Court reversed,\textsuperscript{19} holding the state action exemption inapplicable to Detroit Edison's conduct in implementing and conducting the light bulb program.\textsuperscript{20} In reaching its decision, the Court rejected Detroit Edison's contention that it would be unfair to subject a private citizen to antitrust liability for merely obeying the command of a state law.\textsuperscript{21} The Court reasoned that, even though the light bulb program was subject to the final approval of the Public Service Commission, the program was primarily the creation and responsibility of Detroit Edison.\textsuperscript{22} The Court thus concluded that Detroit Edison's role in formulating and conducting the light bulb program was sufficiently dominant to require its conduct to conform to the

\textsuperscript{13} The cost of Detroit Edison's light bulb plan to the company's consumers was $2,835,000 a year. The utility company claimed the retail cost of such light bulbs to be over $6,000,000 a year. \textit{Id.} at 584 n.9.

\textsuperscript{14} Detroit Edison's abandonment of the light bulb program without the Commission's approval would constitute a violation of state law. \textsc{Mich. Comp. Laws Ann.} § 450.558 (1967).

\textsuperscript{15} In granting the Public Service Commission "complete power and jurisdiction to regulate all public utilities in the state . . ." \textsc{Mich. Comp. Laws Ann.} § 460.6 (1967), the Legislature vested it with the authority "to regulate all rates, fares, fees, charges, services, rules, conditions of service, and all other matters pertaining to the formation, operation, or direction of such public utilities." \textsc{Mich. Comp. Laws Ann.} § 460.6 (1967).

\textsuperscript{16} \textit{Id.} at 584.

\textsuperscript{17} \textit{392 F. Supp. 1110 (E.D. Mich. 1974)}.

\textsuperscript{18} \textit{513 F.2d 630 (6th Cir. 1975)}.

\textsuperscript{19} The Court's opinion, per Justice Stevens, is divided into four sections: Section I sets forth the facts of the case; Sections II and IV contain Justice Stevens' interpretation of the proper scope of the state action exemption; and Section III addresses the resolution of the instant case. Only a plurality of the Court accedes to Justice Stevens' interpretation of the state action exemption (Brennan, White and Marshall JJ.). Chief Justice Burger joins with the plurality in Sections I and III of the opinion.

\textsuperscript{20} \textit{428 U.S. at 598}.

\textsuperscript{21} \textit{Id.} at 594-95.

\textsuperscript{22} \textit{Id.} at 594.
standards created for unregulated businesses under the antitrust laws.\textsuperscript{23}  

The Court also rejected, on three separate but interrelated grounds, Detroit Edison's claim that Congress did not intend the Sherman Act to apply to conduct already subject to state regulation.\textsuperscript{24}  The mere fact that conduct is subject to both state regulation and the antitrust laws was not seen as necessarily subjecting the conduct to inconsistent standards.\textsuperscript{25}  Furthermore, the Court reasoned that the mere fact of inconsistency between the state and federal standard is insufficient to subordinate the federal interest.\textsuperscript{26}  The Court concluded that even if Congress did not intend the Sherman Act to apply to state-regulated conduct, antitrust enforcement would not be precluded in an essentially unregulated market such as that for light bulbs.\textsuperscript{27}  

The Court in \textit{Cantor} set out the same standard for determining the proper cases in which to apply the state action exemption from the antitrust laws\textsuperscript{28} as is applied to federal regulatory legislation. Under this standard, an exemption is granted only if necessary to make the regulatory scheme work, "and even then only to the minimum extent necessary."\textsuperscript{29}  Applying the standard to the instant case, the Court concluded that the state's ability to regulate the utility's natural monopoly in the distribution of electricity would be unimpaired by the application of antitrust principles to the utility's activities in competitive markets.\textsuperscript{30} 

\textsuperscript{23}  \textit{Id.} at 594-95. In reaching this conclusion, the Court noted that Detroit Edison had initiated its light program several years before the Commission was created. \textit{Id.} 

\textsuperscript{24}  \textit{Id.} at 595-97. 

\textsuperscript{25}  \textit{Id.} 

\textsuperscript{26}  \textit{Id.} The Court concluded that Congress could not have intended the states "to have broader power than federal agencies to exempt private conduct from the antitrust laws." (footnotes omitted). \textit{Id.} at 596. 

\textsuperscript{27}  \textit{Id.} at 595-96. Since neither the Michigan legislature nor the Public Service Commission had investigated the desirability of the light bulb program or calculated its competitive effect, the Supreme Court reasoned that the state had not adopted a public policy of supplanting competition in the light bulb market. \textit{Id.} at 593-94. See \textit{id.} at 604 (Burger, C.J., concurring). 

\textsuperscript{28}  The Court does not indicate the type of fact situation in which it would be proper to imply an exemption from the antitrust laws. The one situation alluded to in the opinion as possibly qualifying for an exemption is one "in which the State's participation in a decision is so dominant that it would be unfair to hold a private party responsible for his conduct in implementing it . . . ." \textit{Id.} at 594-95. 


\textsuperscript{30}  428 U.S. at 582 n.4.
Only a plurality of the Court adopted Justice Stevens' view that the state action defense exempts only the state, its officials, and its agents from Sherman Act liability. The separate concurring opinions of Chief Justice Burger and Justice Blackmun argued that the exemption should be predicated on the nature of the challenged activity, and not upon the identity of the parties sued. Justice Blackmun also disavowed the majority's application of the federal exemption standard to Detroit Edison's defense, opting instead for a rule of reason approach in which the Sherman Act would preempt state-sanctioned anticompetitive activities where the interference with competition outweighs the potential benefits of the scheme.

Justice Stewart, joined by Justices Powell and Rehnquist, dissented, arguing that Congress never intended the Sherman Act to apply to economic areas subject to state regulation. The dissent attacked the Court's adoption of the federal exemption standard as a judicial usurpation of state legislative prerogatives. Justice Stewart argued that this standard, by allowing the judiciary to reach an independent determination of the "necessity" of a particular regulatory provision, enables the judiciary to make ad hoc evaluations of the substantive validity of state regulatory goals. The judiciary, concluded Justice Stewart, is barred from making such determinations by the Court's rejection of the substantive due process doctrine.

31. Id. at 603 (Burger, C.J., concurring).
32. Id. at 605 (Blackmun, J., concurring).
33. Id. at 610-11. See Slater, supra note 3, in which the author advocates the type of balancing test adopted in Justice Blackmun's opinion. See also notes 80-91 infra & accompanying text infra.
35. 428 U.S. at 627.
36. Id. The substantive due process doctrine was based on the view that the courts may employ the due process clause of the fourteenth amendment to strike down laws which are thought to be unreasonable. See, e.g., Jay Burns Baking Co. v. Bryan, 264 U.S. 504 (1924) (fixing the weight of loaves of bread); Adkins v. Children's Hospital, 261 U.S. 525 (1923) (setting minimum wages for women); Lochner v. New York, 198 U.S. 45 (1905) (outlawing "yellow dog" contracts). This doctrine was rejected in the Court's 1934 decision in Nebbia v. New York, 291 U.S. 502 (1934), where in upholding a New York statute establishing price controls for the milk industry, the Court wrote, "a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adopted to its purpose." Id. at 537. See also Ferguson v. Skrupa, 372 U.S. 726, 728-730 (1963) (upholding Kansas statute prohibiting non-lawyers from engaging in business of debt adjusting); Olsen v. Nebraska, 313 U.S. 226 (1941) (upholding Nebraska statute limiting maximum
I. THE STATE ACTION EXEMPTION: DEVELOPMENT OF THE Parker Doctrine

The state action exemption received its first explicit recognition in the Court's 1943 decision in Parker v. Brown. In Parker, a producer and packer of raisins brought an action against the California Director of Agriculture and other state officials responsible for administering the California Agricultural Prorate Act. The Act established an advisory commission which, upon application by ten affected producers, would establish production limits and price controls for specific geographical areas. The controls became effective only after approval by 65 percent of the growers in the affected zone owning 50 percent of the acreage devoted to production of the regulated crop. The district court upheld Parker's claim that the program interfered with interstate commerce and was preempted by the federal Agricultural Marketing Agreement Act and granted injunctive relief. On direct appeal to the Supreme Court, the parties were directed to also argue the question of the program's validity under the Sherman Act. In its discussion of the antitrust issue, the Court assumed that the program would violate the Sherman Act if organized and directed by private persons but held the Sherman Act inapplicable to restraints imposed by the state as sovereign. The Court noted that the Act contains no mention of the state and

allowable fee of private employment agencies); United States v. Carolene Products Co., 304 U.S. 144 (1938) (upholding federal statute prohibiting interstate shipment of adulterated milk).

37. 317 U.S. 341 (1943). Although Parker v. Brown is usually cited as the case that first recognized the state action exemption and is the center of the Court's attention in Cantor, the principle discussed in Cantor can be traced to two earlier cases: Lowenstein v. Evans, 69 F. 908 (D.S.C. 1895), and Olsen v. Smith, 195 U.S. 332 (1904). In Lowenstein, the circuit court rejected a North Carolina liquor merchant's Sherman Act challenge of a South Carolina statute creating a state monopoly in spirits. The court held the Sherman Act applicable only to privately created monopolies. In Olsen, the Supreme Court upheld a Texas statute which limited the pilotage business to licensed pilots, stating, "[N]o monopoly or combination in a legal sense can arise from the fact that the duly authorized agents of the state . . . 'perform the duties devolving upon them by law.'" 195 U.S. at 345.


39. 317 U.S. at 346-47.

40. Id.


43. Supreme Court Journal, October Term 1941, at 252.

44. 317 U.S. at 350-52. The Court also upheld the California program against the preemption and commerce clause challenges, finding the state scheme compatible with
was viewed by its sponsor as prohibiting only private business combinations.\textsuperscript{48} Although the organization of the prorate zone involved a mixture of private and state action, the Court concluded that the state's role in adopting and enforcing the program through the commission was sufficient to place the program beyond the reach of the Sherman Act.\textsuperscript{46} The one qualification placed on the seemingly open-ended antitrust exemption granted in Parker was the Court's statement that a state may not immunize private parties from the operation of the Sherman Act by authorizing them to violate it or by declaring their action lawful.\textsuperscript{47} This limitation, however, was apparently intended by the Court to apply only where the state is not acting to further an affirmative regulatory scheme.\textsuperscript{48} Thus, in Schwepmann Brothers v. Calvert Distillers Corp.,\textsuperscript{49} the Supreme Court cited Parker's statement that a state may not compel private conduct forbidden by the Sherman Act, in invalidating a Louisiana statute that permitted resale price maintenance contracts to be binding on nonsigners.\textsuperscript{50} Since the Louisiana statute was clearly not enacted to further a state regulatory scheme but rather sought to exempt private citizens from the antitrust laws, the exemption was found to be inapplicable.

The Parker doctrine was again reviewed by the Court in Goldfarb v. Virginia State Bar Association.\textsuperscript{51} Goldfarb set out the exemption's threshold requirement that the state action be required by the state acting as sovereign.\textsuperscript{52} In reviewing the question of price fixing by lawyers, the Court rejected the claim of respondent state and county bar associations that their enforcement of minimum fee schedules had been prompted by the Virginia Supreme Court's adoption of ethical codes authorizing the issuance of such schedules. In the Court's view, the Virginia Supreme Court's direction to lawyers not to

\textsuperscript{45} Id. at 351. See also 21 CONG. REC. 2562, 2457 (1890) (remarks of Senator Sherman).

\textsuperscript{46} 317 U.S. at 352.

\textsuperscript{47} Id. at 351, citing Northern Securities Co. v. United States, 193 U.S. 197, 332, 344-47 (1904).

\textsuperscript{48} Where the state is acting to further an affirmative regulatory scheme, the exemption apparently applies however spurious the nature of the state interest involved or however harmful the effect of the provision on competition. See Slater, supra, note 3, at 91; Handler, supra note 4, at 12.

\textsuperscript{49} 341 U.S. 384 (1951).


\textsuperscript{51} 421 U.S. 773 (1975).

\textsuperscript{52} Id. at 790, citing Parker v. Brown, 317 U.S. 341, 350-52 (1943).
be controlled by fee schedules indicated that the State of Virginia did not require respondents' anticompetitive conduct. The fact that respondents' enforcement of mandatory minimum fees may have been prompted by the Virginia Supreme Court's issuance of the ethical codes was deemed insufficient to confer the antitrust law exemption. The Goldfarb Court did not indicate whether the state action exemption would have been applied had the State, however, required the bar association's enforcement of minimum fee schedules. Far from clarifying the ultimate parameters of the state action exemption, the Court's finding that respondents' activities were not required by the state amounted merely to a determination that the state had not acted. The Goldfarb Court thus did not confront the question of whether the Sherman Act must bow to inconsistent state regulation.

Many of the lower federal courts that have declined to apply the state action exemption to the activities of private parties have also failed to confront the question of whether the Sherman Act preempts inconsistent state regulation. In developing various tests for determining the existence of antitrust law immunities, the courts have instead focused on aspects of the challenged scheme that indicate whether the state authorized the private parties' anticompetitive activities. Thus in Marnell v. United Parcel Service of America, Inc., the District Court for the Northern District of California rejected the state action defense claim of a regulated trucking company sued for monopolization. Although the trucking company was subject to state regulation, the court concluded that the exemption was inapplicable since the regulatory scheme was "one of general supervision rather than one of specific direction."

53. 421 U.S. at 788-90. Although the state bar association was a state agency for the purpose of regulating the legal profession in Virginia, the Court rejected the view that this status would be employed to "create an antitrust shield that allows it to foster anticompetitive practices for the benefit of its members." Id. at 791 (footnote omitted). The Court concluded that the state bar's enforcement of the county bar's minimum fee schedules through the threat of potential disciplinary actions for noncomplying attorneys was "essentially a private anticompetitive activity." Id. at 790-91.

54. Id. at 791.


56. Id. at 409. See also Hecht v. Pro-Football, Inc., 444 F.2d 931 (D.C. Cir. 1971), cert. denied, 404 U.S. 1047 (1972) (Congress did not intend to put activities of D.C. armory board beyond reach of antitrust laws); Asheville Tobacco Bd. of Trade v. FTC, 263 F.2d 502, 508 (4th Cir. 1959) (activities of state created tobacco board the result of individual and not state action). But see the following cases where courts immunized privately initiated and enforced anticompetitive schemes: Washington Gas Light Co. v. Virginia Electric Power Co., 438 F.2d 248 (4th Cir. 1971) (state action found in regulatory agency's failure to disapprove of utility's tying arrangement); Fleming v. Traveler's
A similar result was reached by the Western District of Pennsylvania in *Travelers Insurance Co. v. Blue Cross*, where the court refused to apply the state action exemption to defendant's alleged restraint and monopolization of the hospital insurance business. Although Blue Cross was regulated and supervised by Pennsylvania's Insurance Department, the court deemed the state action exemption inapplicable since the legislature had not directed either the Insurance Department or Blue Cross to employ anticompetitive practices to achieve a governmental purpose. This ruling comports with the results reached by other courts which have held that the state action exemption applies only where the state had determined that competition was not desirable in a particular field and substituted an alternate form of public regulation.

Several lower courts, however, have broadly applied the state action exemption to immunize private conduct that arguably was never specifically considered by the state body regulating the challenged party. These courts have applied the Sherman Act exemption where the final authority to approve or disapprove the private parties' conduct was lodged in a state officer or agent. In *Allstate Insurance Co. v. Lanier*, the Fourth Circuit immunized a privately initiated scheme in which insurance companies formed a rating board to set uniform rates throughout North Carolina. The court's holding rested solely on the fact that the rates were not effective until approved by the State Commissioner of Insurance.

The Fourth Circuit considerably broadened the exemption created in *Allstate in Washington Gaslight Co. v. Virginia Electric and Power Co.* In this case, plaintiff gas company challenged as unlawful a tying arrangement...
in which Virginia Electric and Power Company (VEPCO) waived underground installation charges for builders installing electrical appliances which were designed to use certain quantities of electricity. Although the plan had not been approved by the state utility commission, the court concluded that the failure of the state regulatory agency to approve or disapprove of the defendant's anticompetitive activities as insufficient to deprive it of Sherman Act immunity. The court reasoned that, since the state agency possessed the power to prohibit VEPCO's promotional plan, its administrative silence implied consent to that plan. The ruling represents the high water mark of judicial solicitude for state prerogatives that underlies the state action exemption and illustrates the extent to which Parker enabled private parties to shield their anticompetitive behavior from the penalties of the antitrust laws through the simple expedient of cloaking them in a state action garb.

II. Cantor: Setting the Proper Boundaries of the State Action Exemption?

The Cantor ruling greatly limits the antitrust immunity of regulated parties by indicating that the mere presence of state regulation is insufficient to confer antitrust immunity upon the private parties' conduct. By predicing the existence of antitrust immunity on whether the immunity is necessary to make the regulatory act work, and applying the exemption to the minimum extent necessary to effect its policies, the Court's new test portends a significant limitation on state regulatory prerogatives. Since a determination of the "necessity" of a particular regulatory provision necessarily involves judicial inquiry into the substantive validity of state regulatory goals, the Court's new test is subject to attack as a resurrection of the long-rejected doctrine of substantive due process. Thus, while the Cantor Court correctly perceived the necessity of limiting the potentially open-ended immunity created by Parker, its test fails to adequately acknowledge or assess the origins of the state action exemption in the principles of federalism.

Similarly, the plurality's limitation of Parker to an exemption for the actions of only the state and its officers does not logically follow from the language employed in that decision. While not without precedent, this view

63. Id. at 249-50.
64. Id. at 252.
65. 428 U.S. at 596.
66. See note 36 supra.
67. See Travelers Ins. Co. v. Blue Cross, 298 F. Supp. 1109, 1112 (W.D. Pa. 1969), where, in holding the anticompetitive activities of a regulated non-profit hospital plan corporation subject to the antitrust laws, the court stated, "Blue Cross fails to meet the apparent standards inherent in a 'state action' exclusion from the scope of the Sherman
of *Parker* misreads the basic issue in that case, which was whether the restraint of trade accomplished through the California program was exempt from the Sherman Act. 68 It is doubtful that the *Parker* court contemplated a plaintiff being able to circumvent its decision, interfere with a state’s program, and subject a private party to possible treble damages, simply by naming a private party as defendant. 69 The analytical inadequacy of the plurality opinion is illustrated by the fact that it derives its interpretation of *Parker* not so much from the language of the Court, as from the briefs filed in that case. 70 It is only by employing the briefs as a “legislative history” of the case 71 that the plurality could logically limit the *Parker* holding as it did.

The plurality’s view of the scope of the state action exemption amounts to a sub silentio overruling of *Parker*. The plurality’s restrictive view of *Parker* is not only questionable as an analytical matter, but is simply unnecessary to the resolution of the state action problem in *Cantor*. *Parker* can be viewed as involving no question of the subordination of federal to state interests since the federal statute 72 governing agricultural policy envisioned the development of concurrent state programs. 73 In the California program challenged in *Parker*, the Secretary of Agriculture had made loans to the prorate plan under a federal statute authorizing loans for the accomplishment of federal agricultural policies. 74 The *Parker* immunity can therefore be viewed as flowing not from the state’s action in implementing the prorate program, but rather from the actions of the federal government. 75 Since the Supreme Court will imply exemptions from the antitrust laws to the extent necessary to effect the purposes of federal legislation, 76 the *Parker* Court could have upheld the California program without reaching the question of federal antitrust policy.

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70. 428 U.S. at 617 (Stewart, J., with Powell and Rehnquist, JJ., dissenting). As the dissenters note, “The conflicting views presented in the adversarial briefs and arguments submitted to this Court do not bear an analogous relationship to the Court’s final product.” *Id.* at 618.
71. *Id.*
73. See 317 U.S. at 358.
74. *Id.* at 356.
Similarly, by focusing on the prorate program's effectuation of federal policy, the Cantor plurality could have avoided the analytical pitfalls of its limitation of *Parker* to suits against state officials and reaffirmed the basic legitimacy of state efforts to regulate matters of local concern.

The substantive due process ramifications of the Cantor majority's application of the federal exemptions standard could also have been avoided if the majority had directly confronted the question of the Sherman Act's preemptive effect on inconsistent state regulation. The majority's statement that "[c]ongress could hardly have intended state regulatory agencies to have broader power than federal agencies to exempt private conduct from the antitrust laws" fails to recognize that while federal exemptions are based solely on statutory construction, the state action exemption is premised on the view that Congress did not intend the Sherman Act to apply to restraints of trade imposed by the states acting in their sovereign capacities. The concurring opinion of Justice Blackmun recognizes the deficiencies inherent in both the plurality and majority views of the state action exemption and articulates a rule of reason balancing test approach to state action problems. Under Justice Blackmun's approach, state-sanctioned anticompetitive activity would be subject to the prohibitions of the Sherman Act where the potential harms of the scheme outweigh its benefits.

Justice Blackmun notes that while the legislative history of the Sherman Act reflects the view that state regulation was exempted from the Act, this view is indicative only of the narrow construction then given to Congress' power to regulate under the commerce clause. At the time of the Sherman Act's passage, manufacturing was not considered part of interstate commerce and Congress' power to regulate under the commerce clause had been limited to interstate buying, selling, and transportation. The Supreme Court subsequently rejected this narrow view of the commerce clause by holding, in a long series of cases, that purely intrastate actions could be regulated under the commerce clause if they had the requisite effect on interstate commerce.

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77. 428 U.S. at 596.
78. The question for the Court is simply one of resolving whether the federal regulatory provision is inconsistent with the Sherman Act, since Congress clearly possesses the power to amend or repeal the provisions of the antitrust laws. See cases cited note 29 supra.
80. 428 U.S. at 610 (Blackmun, J., concurring).
81. *See* sources cited note 34 supra.
82. 428 U.S. at 605 (Blackmun, J., concurring).
commerce. The Court has incorporated this expanded concept of the commerce clause into its view of the Sherman Act's reach by ruling that Congress intended the Sherman Act to expand along the lines of the commerce clause.

The preemption test advocated by Justice Blackmun attempts to balance the competing federal and state interests by applying the antitrust exemption only where the state can demonstrate that its regulatory scheme is enacted on the plausible ground of improving health, safety, market performance, or resource allocation. In short, the state's interest in regulation is preserved in those areas where it has substituted itself for the forces of competition to achieve a permissible state regulatory goal. This test would immunize the prorate program challenged in Parker, since dangerously fluctuating agricultural prices are a valid subject for state regulation. The light bulb program involved in Cantor, however, would be denied the exemption in the absence of a showing by Detroit Edison that a particular state interest outweighed the program's anticompetitive impact. While Justice Blackmun's rule of reason approach circumscribes the regulatory powers of the states, it avoids the substantive due process ramifications of the majority's approach by avoiding any inquiry into the "necessity" of a particular state provision. The focus, rather, is purely on whether the state interest served by the regulatory scheme justifies the subordination of the federal government's interest in antitrust enforcement.

87. 428 U.S. at 610-11 (Blackmun, J., concurring).
88. Id.
89. See id. at 611.
90. Id. at 613 n.5.
91. See id. at 613-14. Justice Blackmun also recognizes the possibility of a fairness defense based on the fact that Detroit Edison's breach of its tariff would result in a violation of Michigan Law. Id. at 614 n.6.
92. One additional objection of the dissenters meriting discussion is Justice Stewart's view that under the holding in Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961), no liability can attach to the utility's acts in proposing the tariff. Noerr held that antitrust immunity can be predicated on the activities of businesses lobbying before public officials for legislation that would have anticompetitive effects. The Noerr Court stated that the application of the Sherman Act to these measures would interfere with the first amendment right to petition the government and would undermine the democratic processes of representative government by depriving citizens of the essential right of communicating with public officials. See also UMW v. Pennington, 381 U.S. 657 (1965). The dissent follows this line of argument by stating that the utility's acts in complying with the tariff are also exempt from antitrust law enforce-
III. CONCLUSION

The Cantor decision drastically curtails the states' power to insulate private anticompetitive conduct from the antitrust laws. While the Court is sharply divided on the means by which the state action exemption is to be narrowed, a clear majority favors confining the exemption to those instances where it is necessary to effectuate an overriding state interest. Since Cantor concerns a trade restraint that was clearly tangential to the state's interest in utility regulation, the ultimate impact of the case is difficult to assess. It is doubtful that the Court intends the decision to apply to pervasive state regulatory schemes, but the majority's failure to immunize state programs manifesting a legitimate legislative policy of replacing competition with regulation casts an ominous pall over the states' ability to regulate. This pall would be eliminated by the majority's adoption of Justice Blackmun's approach, which preserves the states' interest in legitimate regulation, while lessening the possibility that a court would exempt from the antitrust laws private conduct that is merely clothed as state action. The Blackmun approach would establish a rule that is consistent both with the federal antitrust laws and the solicitude for state regulatory prerogatives that underlies the state action exemption.

Stephen C. Skubel

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An individual who has been deprived of a specific constitutional right under color of state law may sue the person who deprived him of that right under 42 U.S.C. § 1983 for equitable relief or monetary damages. Read literally, section 1983 imposes liability without requiring proof of the defendant's motive or the unreasonableness of his actions, and without regard to the scope of his discretion when acting in his official capacity. Courts, however, have declined to give the language of the section its literal meaning. Instead, they have recognized both absolute and qualified immunity from liability under the section, based on the status of the individual defendant. Recently, the Fourth Circuit Court of Appeals, in Minns v. Paul, became the second federal circuit to hold that court-appointed attorneys are absolutely immune from section 1983 liability in suits which are brought by their former clients.

In Minns, an inmate of a Virginia prison alleged that his court-appointed attorney had failed to honor his request to file a petition for habeas corpus without communicating the reasons for his inaction. Thirty-seven days after

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   Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.


3. 542 F.2d 899 (4th Cir. 1976).


5. The appointment was pursuant to VA. CODE § 53-21.2 (1974), which provides:
   The judge of a court of record having jurisdiction in the trial of criminal offenses . . . shall on motion of the Commonwealth's Attorney for such county
his initial request had been made, Minns brought suit against the attorney under section 1983 in the United States District Court for the Western District of Virginia. He sought a declaratory judgment, $200 in compensatory damages, and $50 in punitive damages, alleging that the attorney's failure to assist him had deprived him of his liberty without due process of law. The district court dismissed the suit for lack of jurisdiction, holding that the attorney had not acted under color of state law.6

The Fourth Circuit, although affirming the district court's dismissal, assumed that the attorney had acted under color of state law so as to satisfy the jurisdictional requirement of section 1983. However, the circuit court stated that court-appointed attorneys should be absolutely immune from section 1983 liability for acts performed within the scope of their court appointment.7 Noting that the Supreme Court has recognized the existence of immunity from section 1983 liability for state officials within the judicial process, the Fourth Circuit held that the same considerations of policy that entitle state officials to immunity should be extended to court-appointed attorneys. According to the court's analysis, those considerations include not only the need to protect the court-appointed attorney's "free exercise of professional discretion," but the need to recruit and keep able lawyers to represent indigents. To further both objectives, the court stated, the court-appointed attorney must be insulated from liability for failing to press the "frivolous" claims that indigent clients often bring. Without absolute immunity, the court reasoned, the attorney would not be free to exercise his best judgment, for he would have to weigh each decision against the possibility that a dissatisfied client could later force him to spend time and energy on his own defense that otherwise could be devoted to the meritorious claims of other indigents.8

Moreover, the court noted that the indigent client is not left remediless by being deprived of a cause of action against his attorney under section 1983. Other forms of relief cited by the court include the indigent's right to seek post-conviction relief through direct appeal or habeas corpus petition,

or city, when he is requested so to do by [a prison superintendent] . . . , appoint one or more discreet and competent attorneys-at-law to counsel and assist indigent inmates therein confined regarding any legal matter relating to their incarceration, other than that pending in any court and for which an attorney-at-law has been appointed by the court or otherwise obtained by an inmate.

An attorney so appointed shall be paid as directed by the court from the criminal fund, reasonable compensation on an hourly basis and necessary expenses, based upon monthly reports to be furnished the court by him.

6. 542 F.2d at 900.
7. Id.
8. Id. at 901-02.
to act as his own counsel, or to file a grievance against the attorney with his
state bar association. Significantly, the court also stated that by assuming
that the court-appointed attorney acts under color of state law, its decision
preserves the public right to prosecute the court-appointed attorney who will-
fully abuses his position to deprive his client of his constitutional rights under

I. FEDERAL RIGHTS FOR STATE WRONGS

Section 1983, like section 242, originated in the Civil Rights Act of 1871, the basic purpose of which was to provide a federal remedy for the crimes which were perpetrated against blacks in the Southern States during Recon-
struction. When the Act was passed, its civil damages section was consid-
ered relatively innocuous as compared to the criminal penalty. More re-
cently, however, section 1983 has been increasingly utilized instead of section 242, because it affords a private civil remedy for the victim of a constitutional deprivation without requiring him to prove the defendant’s ill will or specific intent. Furthermore, while section 1983 was originally enacted to provide

9. Id. at 902. After this casenote was written, the Virginia Bar Association pub-
lly reprimanded an attorney for his “unwarranted delay” in filing the habeas corpus petition of a paying client, which caused the client to spend an extra four months in prison. See Wash. Post, Mar. 6, 1977, § B, at 1, col. 1.
10. 18 U.S.C. § 242 (1970) provides:
   Whoever, under color of any law, statute, ordinance, regulation, or custom,
willfully subjects any inhabitant of any State, Territory, or District to the dep-
rivation of any rights, privileges, or immunities secured or protected by the
Constitution or laws of the United States, or to different punishments, pains,
or penalties, on account of such inhabitant being an alien, or by reason of
his color, or race, than are prescribed for the punishment of citizens, shall
be fined not more than $1,000 or imprisoned not more than one year, or both;
and if death results shall be subject to imprisonment for any term of years
or for life.
Sess., App. 372-81 (1872) (speech of Sen. F.P. Blair); Id. at 471-84 (speech of the
Hon. John Coburn) (There was no debate on this portion of the Civil Rights Act of
1871 when it was passed by Congress. The remarks previously cited in this footnote
were made early in the congressional session that immediately followed passage of the
Act.). See generally Avins, The Ku Klux Klan Act of 1871: Some Reflected Light on
State Action and the Fourteenth Amendment, 11 St. Louis U.L.J. 331 (1967); Shapo,
Constitutional Tort: Monroe v. Pape and the Frontiers Beyond, 60 Nw. U.L. Rev. 277
(1965). See also J. Randall & D. Donald, The Civil War and Reconstruction
1345 (E.D. Okla. 1974) (charge under section 242 may only be initiated by federal
federal redress for blacks, it has subsequently been used to provide a remedy for acts that are not racially motivated.\textsuperscript{15}

Although section 1983 has often been utilized to provide injunctive and declaratory relief, the Supreme Court first considered the boundaries of its jurisdiction and the scope of its liability with respect to a suit for monetary damages in \textit{Monroe v. Pape}.\textsuperscript{16} There the Supreme Court found that a valid section 1983 claim had been asserted against a group of Chicago police officers who had broken into the plaintiff's home at night without a warrant, subjected him and his family to assaultive conduct and personal indignities, and detained him incommunicado on open charges for ten hours without arresting him or bringing him before a magistrate.\textsuperscript{17} The Court held that since one purpose of section 1983 was to provide a right in federal court for the state's failure to enforce its own laws or to honor the constitutional rights of its citizens,\textsuperscript{18} the police officers had acted under color of state law when they had exceeded and abused the authority which had been given them. The Court expressly rejected the notion that "willfulness" or specific intent to deprive an individual of his constitutional rights need be established for section 1983 liability, concluding instead that the section "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions."\textsuperscript{19}

The sweeping concluding language in \textit{Monroe} left courts in a quandary as to how section 1983 liability was to be measured. Subsequent cases have tended to limit liability under the section, either by finding that the particular...

\begin{thebibliography}{9}
\bibitem{16} 365 U.S. 167 (1961).
\bibitem{17} \textit{Id.} at 169.
\bibitem{18} \textit{Id.} at 180.
\bibitem{19} \textit{Id.} at 187. However, in \textit{Adickes v. S.H. Kress \& Co.}, 398 U.S. 144, 171-74
\end{thebibliography}
defendant did not act under color of state law or by granting him immunity from liability when this jurisdictional requirement has been satisfied. Additionally, courts have differentiated between a grant of qualified immunity, in which a particular defendant may be liable only for his negligent acts, and absolute immunity, which extends to all acts performed within the scope of the individual's actual or apparent authority. Particularly within the criminal justice system, judicially imposed jurisdictional requirements and grants of immunity have severely limited the liability of defendants in section 1983 actions since *Monroe* was decided.

II. ARE ATTORNEYS LIABLE FOR THEIR "CONSTITUTIONAL TORTS"?

Four classes of persons occupy prominent positions within the criminal justice system: judges, prosecutors, defense attorneys, and law enforcement officers. It has been firmly established that persons who possess actual official authority, whether elective or appointive, and persons who misuse their apparent authority act "under color of law" for section 1983 purposes. Thus, judges, prosecutors, and law enforcement officers all occupy positions which place them within the jurisdictional bounds of section 1983. By contrast, defense attorneys arguably do not act under color of law and therefore are not covered by section 1983. Although all attorneys are "officers of the court," attorneys who participate in private state court litigation are not, without more, state functionaries for purposes of section 1983.

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(1970), the Court found it essential that a defendant in a section 1983 action have acted with the knowledge of and pursuant to state statute or custom.

20. Language in *Monroe* supports the interpretation that the under-color-of-state-law requirement in section 1983 is coextensive with the state action requirement of the fourteenth amendment. 365 U.S. at 171. But the Supreme Court has stated in both Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351 (1974) and Moose Lodge v. Irvis, 407 U.S. 163, 176 (1972), that state action is predicated upon finding a "sufficiently close nexus" between the state and the wrong which is alleged in order to attribute the wrong to the state itself. The absence of such a nexus will defeat federal jurisdiction under section 1983. See, e.g., Cohen v. Illinois Institute of Technology, 524 F.2d 818 (7th Cir. 1975), cert. denied, 425 U.S. 943 (1976); Cody v. Union Elec., 518 F.2d 978 (8th Cir. 1975).


ney is appointed by the court itself, however, and his salary is paid out of public funds, a closer connection exists between the attorney's activities and the state. Nevertheless, federal courts have often held that this connection alone cannot be parlayed into an actionable claim against the court-appointed attorney under section 1983.

The view that court-appointed attorneys do not act under color of law for purposes of establishing federal jurisdiction under section 1983 has been accepted by the Sixth, Eighth, and Tenth Circuits, and was the rule in the Third Circuit until 1972. Courts that have adopted this view have reasoned that while the attorney may receive his appointment and remuneration from the state, his duties upon appointment are essentially those of the privately retained counsel. The standard for the adequacy of the attorney's legal services is the same whether he represents an indigent or a paying client—"the exercise of the customary skill and knowledge which normally prevails at the time and place."

In *United States ex rel. Wood v. Blacker*, the New Jersey district court stated that the activities of a public defender did not constitute state action, because the attorney was not the state's representative and the state did not control his defense of the assigned client. Moreover, the state act which had created the public defender service had not given the public defender any authority which he did not already possess by virtue of his license to practice law. Thus, the nexus between the state's sponsorship of the public defend-

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24. While there is a conceptual difference between the court-appointed attorney and the public defender in terms of state action (since the state creates the institution in the latter instance but only makes the appointment in the former), only one court has considered the distinction worth mentioning. *Brown v. Joseph*, 463 F.2d 1046, 1048 (3d Cir. 1972), *cert. denied*, 412 U.S. 950 (1973). See Gozansky & Kertz, *supra* note 22, at 970-71.


28. *Id.* at 47. *Accord*, *Harkins v. Eldredge*, 505 F.2d 802, 803 (8th Cir. 1974);
er system and the essentially discretionary activity of the public defender was insufficient to attribute his alleged misconduct to the state. 29

By contrast, the circuits that have conferred immunity on court-appointed attorneys 30 have relied heavily on cases that have granted immunity from section 1983 liability to both judges and public prosecutors. In Pierson v. Ray, 31 the Supreme Court granted absolute immunity from section 1983 liability to state court judges for acts performed within their "judicial role." The Court acknowledged that section 1983 made no explicit reference to immunities, but it found no congressional intent in the legislative history of the Civil Rights Act to abrogate the common law immunity of judges from liability in the performance of their official acts. The Pierson Court also recognized that judges perform many discretionary acts, and that the public interest would be served by giving judges the "liberty to exercise their functions with independence, and without fear of consequences." 32 Thus, judicial immunity from section 1983 liability extended even to malicious and corrupt judicial acts, on the rationale that the immunity concept was designed to protect the public's interest in the uninhibited exercise of judicial discretion and was only secondarily a shield for the judge himself. 33 Extending absolute immunity from section 1983 liability to prosecutors in Imbler v. Pachtman, 34 the Supreme Court recently cited the need to insulate prosecutorial discretion and judgment from further judicial review. Anything less than absolute immunity from liability, the Court stated, would divert prosecutors' energies and attention from enforcing the criminal law; moreover, the substantial risk of incurring liability under section 1983 from frequent damage suits would interfere with prosecutors' exercise of independent judgment. 35

Espinoza v. Rogers, 470 F.2d 1174, 1175 (10th Cir. 1972).
29. 335 F. Supp. at 47. See cases cited in note 25 supra.
35. Id. at 424-28. The Court also noted that prosecutors, like judges, had been immune from liability for their official acts at common law. Id. at 421-24. But cf. Madison v. Purdy, 410 F.2d 99 (5th Cir. 1969) (prosecutor can be sued when acting outside the scope of his jurisdiction).

In Johnson v. Crumlish, 224 F. Supp. 22, 25 (E.D. Pa. 1963), a prosecutor was denied section 1983 immunity where the claim of the accused was based on summary imprisonment under an allegedly illegal bench warrant without a hearing. The holding of this case, however, has apparently been limited to its peculiar facts. See Brown v. Joseph, 463 F.2d 1046 (3d Cir. 1972), cert. denied, 412 U.S. 950 (1973); Arensman
The Third Circuit in *Brown v. Joseph*,<sup>36</sup> like the district court in *Wood*, recognized that the function of the state-paid attorney is essentially the same as that of his privately retained counterpart, and the court conceded that it would be difficult to perceive that the former had acted under color of law when the latter did not. Yet the court extended immunity to public defenders because it believed the public policy implicit in granting such immunity was to encourage the “free exercise of professional discretion in the discharge of pretrial, trial, and post-trial obligations.”<sup>37</sup> The grant of immunity to such attorneys would encourage people to become public defenders and would relieve them of the “intrinsic conflict” between protecting themselves and representing their clients.<sup>38</sup>

The *Brown* court, in assuming that the public defender had acted under color of law, appeared to be more concerned with formulating a general rule regarding attorneys’ liability under section 1983 than with debating the threshold issue of federal jurisdiction. However, the Seventh Circuit, which granted qualified immunity to public defenders in *John v. Hurt*,<sup>39</sup> stated that “[i]t is at least arguable that a public defender acts under color of state law.”<sup>40</sup> The *John* court cited *Brown* as precedent but did not differentiate between the scope of qualified, as opposed to absolute, immunity. However, two subsequent Supreme Court cases, one concerning local school board members<sup>41</sup> and the other state executive officials,<sup>42</sup> have clarified the meaning of qualified immunity from section 1983 liability. Qualified immunity varies with the scope of discretion and responsibilities of the particular officer against whom liability is sought, and with the circumstances under which the particular action occurred. It is not available to an official who either acts maliciously toward a particular individual or who negligently disregards an individual’s legal rights in a particular circumstance.<sup>43</sup>

Although the distinction between the cases which have found court-appointed attorneys immune under section 1983 and those which have found them to be acting outside the federal court’s jurisdiction initially may seem minor, the difference may be substantial when a United States attorney attempts to prosecute a court-appointed attorney under section 242 of the

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<sup>37</sup> 463 F.2d at 1048.

<sup>38</sup> Id. at 1049.

<sup>39</sup> 489 F.2d 786 (7th Cir. 1973).

<sup>40</sup> Id. at 787.


criminal code, because the attorney must have acted under color of state law to come within the jurisdiction of the federal court under that section. Therefore, a finding that the attorney had not acted under color of law would not only exempt him from liability under section 1983, but would deprive the public of a right to prosecute him under section 242. In United States v. Senak, the only federal circuit court that has considered this issue concluded that the Government should be given the opportunity to try to establish that the defendant attorney acted under color of law. Senak involved the federal prosecution of a public defender who allegedly had extorted money from his indigent clients and their relatives, threatening to provide inadequate representation unless the extra sums were paid. Citing Brown, the attorney contended that he had not acted under color of law, but the court found Brown inapposite. Not only did the court consider Brown's parallels between the functions of the publicly appointed and privately retained attorney to be dicta, but it also recognized that the policy underlying the grant of immunity was to protect public defenders "for acts done in the performance of [their] judicial function[s] . . . ." The court found that since Senak's alleged extortion lay outside the scope of his duty as a public defender, he was not immune from public prosecution.

III. THE CONSEQUENCES OF THE COURT-APPOINTED ATTORNEY'S IMMUNITY

In Minns v. Paul the Court of Appeals for the Fourth Circuit assumed that the attorney had acted under color of state law so as to satisfy section 1983's jurisdictional requirement, but the court chose to extend immunity to court-appointed attorneys. While the court recognized that both judicial and prosecutorial immunity under section 1983 have their basis in the common law, it reasoned that many of the same considerations of public immunity in John was virtually indistinguishable from the "absolute" grant of immunity in Brown. One district court in the Seventh Circuit subsequently has seemed to adopt the Wood approach, thus rejecting the immunity concept of John. See Ehn v. Price, 372 F. Supp. 151, 153 (N.D. Ill. 1974) (attorney's appointment as counsel does not make him an officer of the state for purposes of section 1983).

45. 477 F.2d 304 (7th Cir.), cert. denied, 414 U.S. 856 (1973).
46. Id. at 305-07.
47. Id. at 307, quoting 463 F.2d at 1048.
48. 477 F.2d at 307. Senak was later tried and convicted for having deprived his clients of their rights under color of law. His conviction was upheld on appeal. See Senak v. United States, 527 F.2d 129 (7th Cir. 1975), cert. denied, 425 U.S. 907 (1976).
49. 542 F.2d 899 (4th Cir. 1976).
50. Id. at 900.
policy which support immunity for judges and prosecutors also apply to court-appointed attorneys, who, like judges and prosecutors, perform duties that are essentially discretionary and therefore must be allowed to exercise their judgment without having to weigh every decision in terms of potential liability. 51 Like Brown and Wood, Minns acknowledged that the court-appointed attorney's primary responsibility is to represent his client, but Minns emphasized, as had Brown, Imbler, and Pierson, both the significant public interest in insulating particular participants within the judicial system from section 1983 liability and the need to protect the free exercise of professional discretion—whether the discretion is being exercised by a judge, a prosecutor, or an attorney.

This choice of absolute rather than qualified immunity assures court-appointed attorneys in the Fourth Circuit total freedom to exercise their discretion without having to defend beyond the pleading stage suits brought by unsuccessful, resentful clients. Like Imbler, Minns declared that the grant of merely qualified immunity would afford uncertain guidelines for the attorney's conduct. 52 The Minns court did not attempt to resolve its holding with the qualified grant of immunity given by the Seventh Circuit in John, but it noted that John was a pre-Imbler decision whose vitality was questionable. 53 Moreover, by its assumption that the court-appointed attorney acts under color of law, the court in Minns preserved a public remedy against the court-appointed attorney who abuses his office willfully to deprive a client of his constitutional rights. 54 If the court of appeals had simply affirmed the district court's decision, no such public right of action would exist under section 242.

On the other hand, the choice of absolute over qualified immunity leaves no civil remedy under section 1983 for the indigent client and may in fact

51. Id. at 901-02.
53. 542 F.2d at 901 n.2. See note 43 supra.
54. Id. at 902. See notes 45-48 & accompanying text supra. In this respect, Minns perhaps revitalized Senak, which other courts have limited to its own peculiar facts. See John v. Hurt, 489 F.2d 786, 787-88 (7th Cir. 1973); Morrow v. Igleburger, 67 F.R.D. 675, 681-82 (S.D. Ohio 1974).

An alternate public remedy not mentioned in Minns but utilized recently by the District of Columbia Circuit is appellate reversal of the lower court's conviction when the defendant has been deprived effective assistance of counsel. See United States v. DeCoster, No. 72-1283 (D.C. Cir., Oct. 19, 1976). Writing for the majority in De-Coster, Judge Bazelon noted that the standard by which the attorney's conduct is to be measured is "reasonably competent assistance"; however, where the court-appointed attorney has substantially violated his articulated duties to his client so as to impair his client's defense, the court, under Bazelon's analysis, may presume that the client was deprived of his sixth amendment right to a fair trial unless the Government rebuts
deprive him of any personal judicial remedy against his court-appointed counsel. Dicta in *Minns* implied that the attorney's alleged misconduct in that case was not the extreme misconduct that section 1983 was designed to prevent;\(^5\) absolute immunity, however, is by definition unconditional so long as the attorney acts within the scope of his court appointment.\(^5\) Although *Minns* referred to the alternate public remedy against the court-appointed attorney under section 242, it is important to note that this criminal sanction provides no private right of action and requires proof of specific intent.\(^5\) Thus, the public action, because it is difficult to establish and prove, may render the public remedy largely illusory.\(^5\)

Finally, *Minns* offers a disturbing assumption about the relationship between the indigent and his court-appointed attorney which had earlier been given credence in *Brown*. Both cases stated that because indigents do not pay for the legal services which they receive, they are more apt to be dis-

the presumption by showing that the consequences of the attorney's misconduct could not have affected the trial court's verdict. *Id.* at 20-25. *DeCoster* has subsequently been vacated and was reheard en banc on May 24, 1977.

\(^{55}\) 542 F.2d at 902.

\(^{56}\) Dicta in *Brown v. Dunne*, 409 F.2d 341, 343 (7th Cir. 1969), suggests that immunity may not be available to the judge or attorney who performs a purely non-judicial or wholly nondiscretionary act or when there is no need to protect the free exercise of independent judgment. Both *Senak* and *Brown v. Joseph* recognized an exception to immunity "where the officials' acts are clearly outside the scope of [their] jurisdiction." 477 F.2d at 307; 463 F.2d at 1048. *Imbler* explicitly reserved the question of whether immunity was required "for those aspects of the prosecutor's responsibility that cast him in the role of an administrator or investigative officer rather than that of advocate." 424 U.S. at 430-31 & n.3. While the question remains open, the most recent Supreme Court decision on point prior to *Imbler* stated that "immunity applies even when the judge is accused of acting maliciously and corruptly." *Pierson v. Ray*, 386 U.S. 547, 554 (1967). Thus, although an exception to immunity may exist for acts beyond the scope of the attorney's official functions, an exception based on the absence of underlying policy considerations would seem to be unsupported by present law.

\(^{57}\) See *Screws v. United States*, 325 U.S. 91, 107 (1945) (specific intent required under section 242).

\(^{58}\) The *Senak* case also shows that the appellate court's assumption that court-appointed attorneys act under color of law does not settle this issue but merely defers proof on what should be a jurisdictional matter until the time of trial. 477 F.2d at 307. The trial court would remain free to reject the argument that the jurisdictional requirement of section 1983 had been met.

In addition, *Minns* mentioned alternate private remedies which remain available to the indigent, including the right to seek postconviction relief through direct appeal or habeas corpus petition, to act as his own counsel, or to file a grievance against the attorney with his state bar association. 542 F.2d at 902. However, given the fact that virtually every indigent in Minns' position lacks not only personal freedom, but the social and economic resources to pursue such relief, those other remedies are more theoretical than realistic. Moreover, even if one of these alternate remedies is success-
satisfied and to harass their attorneys than are paying clients.\textsuperscript{59} Therefore, the \textit{Minns} court concluded, court-appointed attorneys must be insulated from such patently frivolous claims by granting them absolute immunity from section 1983 liability. Such an assumption, although perhaps valid in individual instances, helps perpetuate the belief that "the criminal justice system is deliberately constructed and administered to protect the haves from the have-nots and to perpetuate the status quo."\textsuperscript{60}

IV. CONCLUSION

\textit{Minns v. Paul}, by granting absolute immunity to court-appointed attorneys, illustrates the narrow construction given to section 1983 since that statute was first heralded as a private federal tort remedy in \textit{Monroe v. Pape}.\textsuperscript{61} Not only has the section been construed to reach only certain kinds of wrongs committed by specified persons, but some persons, though wrongdoers, have been exempted from its reach because the public policy of protecting their activities is considered more important than affording a private civil remedy to victims of their wrongdoing. In granting immunity to court-appointed attorneys, \textit{Minns} emphasized the need for a rule of certainty to govern the court-appointed attorney's activities, the desire to encourage capable people to seek public service, and the availability of alternate remedies, both public and private, for the attorney's misconduct.

In making its grant of immunity absolute, \textit{Minns} foreclosed the possibility that section 1983 could be used to compensate an indigent for either the intentional or negligent acts of his court-appointed attorney. By choosing to exempt court-appointed attorneys on the ground of immunity, instead of deciding that there was no state action to establish the court's jurisdiction under the section, the court sought to preserve the public's right to prosecute court-appointed attorneys under section 242 of the United States criminal code. The difficulty of proving such a case, however, makes this remedy ineffectual in many circumstances and offers virtually no deterrence to the incompetent court-appointed counsel whose failure to provide his client with zealous advocacy falls short of willful criminal neglect. While \textit{Minns} recognized that the indigent has access to other remedies, the court's decision has the practical effect of eliminating a private monetary remedy for the person who has the

\begin{itemize}
\item \textbf{fully invoked, it does not compensate the individual for his public humiliation and the economic hardships which his family has suffered while he remained imprisoned, due to his attorney's neglect. See Wash. Post, Mar. 6, 1977, § B, at 7, cols. 3-4.}
\item \textbf{59. 542 F.2d at 901-02; 463 F.2d at 1049.}
\item \textbf{60. N.Y. Times, Sept. 12, 1976, § 6, at 95, col. 1 (letter from William M. Kunstler).}
\item \textbf{61. 365 U.S. 167 (1961).}
\end{itemize}
fewest resources to protect his own interests and therefore probably needs this remedy most. On balance, one is left with the suspicion that although the Fourth Circuit's policy arguments are sound, the solution of absolute immunity for court-appointed attorneys under section 1983 may indeed be more drastic than the problems that the court sought to avoid.

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